(5)

Supreme Court, U.S.
FILED
APR 9 1999
CLERK

No. 98-1359

In The

Supreme Court of the United States

October Term 1998

LYNDEN AIR FREIGHT, INC.,

Petitioner,

v.

DIRECTOR OF TAXATION, STATE OF HAWAII,

Respondent.

On Writ of Certiorari to the Supreme Court
of the State of Hawaii

REPLY BRIEF FOR PETITIONER

GREGG D. BARTON
PERKINS COIE LLP
1201 Third Avenue
48th Floor
Seattle, WA 98101-3099
(206) 264-6258

April 9, 1999

BRUCE J. ENNIS, JR.*
NORY MILLER
JENNER & BLOCK
601 Thirteenth Street, N.W.
12th Floor
Washington, D.C. 20005-3807
(202) 639-6000
* *Counsel of Record*

13pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. PREEMPTION: CAN A PORTION OF AIR CARGO GROSS RECEIPTS BE TAXED? 1

II. THE STATUTORY DEFINITION QUESTION 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

Air Polynesia, Inc. v. Freitas, 742 F.2d 546 (9th Cir. 1984) 7
Air Polynesia, Inc. v. Director of Taxation, Docket No. 2250 (Haw. Tax App. Ct. May 24, 1985) . 7
Airline Car Rental, Inc. v. Shreveport Airport Authority, 667 F. Supp. 293 (W.D. La. 1986) 5
Alamo Rent-A-Car, Inc. v. City of Palm Springs, 955 F.2d 30 (9th Cir. 1992) 5
Aloha Airlines, Inc. v. Director of Taxation of Hawaii, 464 U.S. 7 (1983) 3, 6, 7
City of Philadelphia v. Civil Aeronautics Bd., 289 F.2d 770 (D.C. Cir. 1961) 8
In re Dave's Motor Transportation, No. TSB-D-90(3)C, 1990 N.Y. Tax LEXIS 100 (N.Y. Tax Appeals Trib. Mar. 22, 1990) 5
Department of Revenue v. ACF Industries, Inc., 510 U.S. 332 (1994) 6
Hill v. National Transportation Safety Board, 886 F.2d 1275 (10th Cir. 1989) 9
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 6
Salem Transportation Co. v. Port Authority, 611 F. Supp. 254 (S.D.N.Y. 1985) 5
United States v. Petrykievicz, 809 F. Supp. 794 (W.D. Wash. 1992) 9

STATUTES AND REGULATIONS

49 U.S.C. § 1301(20) (1974) 8
49 U.S.C. § 1301(21) (1974) 8
49 U.S.C. § 1301(23) (1988) 8, 9
49 U.S.C. § 1301(24) (1988) 8, 9
49 U.S.C. § 1302 (1988) 3
49 U.S.C. § 40101 3
49 U.S.C. § 40102(22) 8
49 U.S.C. § 40102(23) 8
49 U.S.C. § 40102(24) 8
49 U.S.C. § 40102(25) 7
49 U.S.C. § 40116 3
14 C.F.R. § 222.2 9

REPLY BRIEF FOR PETITIONER

Nothing in the Hawaii Director of Taxation's ("Hawaii's") opposition weakens the case for this Court's review. Hawaii does not dispute the significance of the decision below, that jurisdictions throughout the country will impose similar taxes if this Court declines review and that such taxes would have a substantial adverse impact on the air transportation industry. Hawaii also does not dispute that, under its apportionment theory, such jurisdictions could impose as much tax by "simply jacking up" the tax rate on the portion of receipts subjected to tax as they could if Congress permitted them to impose tax on total air cargo receipts. Op. Cert. 12. In addition, Hawaii does not dispute that, under the rationale adopted below, states and localities could discriminate against air transportation generally, *id.* at 13, or between different providers. Hawaii does not even defend its own discriminatory practices -- taxing Lynden and UPS but not the air cargo services offered by airlines such as United and Delta, even though they provide identical door-to-door pickup and delivery.

I. PREEMPTION: CAN A PORTION OF AIR CARGO GROSS RECEIPTS BE TAXED?

Hawaii also does not dispute that the decision below presents the question whether states and localities may apportion receipts from sales of air cargo services for the purpose of taxing them. Hawaii agrees there were no separate sales of ground transportation and therefore no receipts from such sales to tax. Op. Cert. 9 ("service provided by Lynden is essentially a complete delivery service" that gets the "package from shipper to recipient"). Hawaii agrees it devised a method to apportion gross receipts from Lynden's total sales of air cargo service, in order to allocate a portion to a category it designated as taxable. It agrees that this method calculates the costs of certain activities that take place on the ground and constructs a ratio of those costs to Lynden's total air cargo service costs, then multiplies that ratio against Lynden's total air

cargo receipts to determine the portion subjected to tax. Pet. App. 5a. Hawaii also agrees with Lynden's listing of the ground activities used to apportion sales receipts: pick up and delivery, sorting centers, sales, marketing, and administration.

The rhetoric in the opposition about mischaracterization does not refer to Lynden's detailed description of how the tax was calculated or which activities were designated as taxable. *See* Pet. 3-4. Hawaii's objection is to Lynden's shorthand references to its accurate and unchallenged detailed descriptions provided in the same filing. Op. Cert. 1-2. Hawaii prefers a different shorthand that assumes its legal conclusions, such as describing activities allocated as taxable as activities "properly associated with the ground transportation." *Id.* at 2. Hawaii's sole factual point, that there were ground costs it did not include in its formula, such as unloading freight from an airplane, is beside the point. *Id.* at 2-3. Lynden did not claim Hawaii included those particular ground costs, and Hawaii has not disputed anything Lynden claimed *was* included.[1]

Hawaii's legal position appears to be that, even though customers make a single purchase from an air cargo company, and even though the ground activities have no independent value to anyone not sending freight by air, states and localities may divide the costs of providing air cargo service into activity that "relates" to ground transportation and activity that "relates" to air transportation, and may tax a portion of air cargo receipts

---

[1]Lynden further suggested that the rationale below does not provide a clear line between the ground activities Hawaii taxed and ground activities that, under the same theory, could be taxed by other jurisdictions. For example, if transporting freight from the airport to a recipient's store is taxable, so is delivery of lost luggage to someone's home. Lynden raised these issues with the understanding that this Court, in considering *certiorari*, is interested not only in the precise line drawn thus far by Hawaii, but also in the implications of its rationale for other jurisdictions and the future.

allocated to activity that "relates" to ground transportation. *Id.* at 2. That rationale argues forcefully for this Court's review because it is inconsistent with the preemption statute, 49 U.S.C. § 40116, inconsistent with this Court's decision in *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 11 (1983), and is a significant threat to Congress' purposes in enacting the statute. Moreover, Hawaii's claim that Lynden has waived any claim with respect to line-drawing, Op. Cert. 4, is mistaken, as the stipulation it quotes makes clear. The issue before this Court -- whether any of these lines may lawfully be drawn -- is very much alive. Lynden agreed only to accept the specific amounts assessed if these taxes were not preempted.

Hawaii presumes that Congress enacted the provision solely to protect the air leg of air cargo transportation from state and local tax, but not to protect air cargo companies' sorting of packages to ensure freight is sent to the correct destination, or their scheduling of which packages will be sent on which planes, or their investigation of claims for missing freight, or their sales and marketing of air freight services, or their handling of freight once it is removed from the plane. That presumption, however, defies reason. Congress cannot be presumed to have enacted statutes to encourage an industry that left air freight on runways, sent packages to random locations, and kept its services secret from the public. Nor is it sensible to assume that Congress was indifferent to whether air cargo companies provide pickup and delivery when experience has proved that air cargo services are not attractive alternatives for most customers without pick up and delivery. Indeed, Congress' express declaration of its goals is inconsistent with such assumptions. Congress' goal is to encourage development of an all-cargo-air transportation *system* that is responsive to the present and future needs of shippers, commerce generally, and national defense. 49 U.S.C. § 1302 (1988); 49 U.S.C. § 40101. Further, its goal is to encourage "an integrated transportation

system," *id.*, that provides both the air carriage and trucking necessary to take a package from shipper to recipient. Contrary to Hawaii's contention, Op. Cert. 11, Congress is not indifferent to the components of Lynden's service that Hawaii asserts are outside the scope of Congress' preemption provision.[2]

Similarly, Hawaii's insistence that a tax on a portion of the service sold by air cargo companies will not affect the cost of the air cargo service and will not deter sales of the service, *id.* at 13, is absurd. Hawaii's tax department may see multiple services being offered. Customers see only one: air cargo service. Either the price at which it is offered is practicable, or it is not. If it is not, customers will ship freight by some other means, and jurisdictions that have imposed the additional cost will have deterred use of the air cargo transportation system Congress was trying to protect from *just* such interference.[3]

Hawaii's suggestion that a high tax on the portion of air

---

[2]Furthermore, Congress expressly rejected a proposal to permit states to tax an apportioned share of gross receipts from air cargo and passenger services. *See* Pet. 20. Hawaii's suggestion that Congress rejected the proposal because it would have permitted taxation of "in-state removal of cargo from an airplane," Op. Cert. 12 n.9, is meritless. Had Congress intended to preserve some portion of such gross receipts for state and local taxation, it could have adopted the line Hawaii has drawn here, or any other line. Congress, however, rejected *any* apportionment of receipts from the sale of air cargo or passenger services for state and local tax purposes, and drafted its preemption provision broadly to insulate *all* receipts from such sales.

[3]Hawaii's contention that interfering with the uniform national pricing used by air cargo companies is not contrary to Congress' preemption provision absent evidence that the provision was enacted to ensure such pricing requires Congress to specify every event that could frustrate its purposes in order to have its statutes enforced. The federal legislature's hands are not so tightly bound. By enacting legislation, including tax preemption, to encourage the development of the air cargo industry, Congress precluded gross receipts taxes that deter development of that industry by disrupting uniform national pricing.

cargo receipts allocated to ground activities would further Congress' purposes by encouraging shippers to use aircraft for greater portions of the routes packages are shipped, *id.* at 12, is nonsense. The nature of air transport -- its speed -- already provides a dramatic advantage over surface transport. A shipper with tight time constraints uses air for as much of the route as possible. A shipper without time constraints ordinarily chooses surface transport if it is cheaper, avoiding air transport altogether. But no matter how high a tax Hawaii imposes on the portion of air cargo receipts allocated to ground activities, Lynden will not be able to pick up packages at customers' downtown locations and deliver them to the airport *by airplane*. Nor will aircraft be able to provide the other activities Hawaii taxed as "related" to ground transportation: sorting, routing, sales, public relations, and administrative functions.

Hawaii's position is not supported by the cases it cites as consistent with the decision below, *id.* at 15, because none presented the preemption question at issue here. None of the taxes challenged in those cases were imposed on a *portion* of a company's gross receipts from sales of air cargo or passenger services. None involved apportionment of gross receipts of any kind or a taxpayer that sold air transportation. In *Alamo Rent-A-Car, Inc. v. City of Palm Springs*, 955 F.2d 30 (9th Cir. 1992), and *Airline Car Rental, Inc. v. Shreveport Airport Authority*, 667 F. Supp. 293 (W.D. La. 1986), for example, the taxes at issue were imposed on the gross receipts car rental companies earned from renting cars. In *Salem Transportation Co. v. Port Authority*, 611 F. Supp. 254 (S.D.N.Y. 1985), the taxpayer operated a limousine service to and from certain airports. Its gross receipts were derived entirely from sales of that service. In *In re Dave's Motor Transportation, Inc.*, No. TSB-D-90(3)C, 1990 N.Y. Tax LEXIS 100 (N.Y. Tax App. Trib. Mar. 22, 1990), the challenged tax was imposed on a trucking company that provided pick up and delivery services

to airlines. Interestingly, the tribunal carefully limited its decision to a tax imposed on a trucking company paid solely to provide ground transportation, and distinguished it from a hypothetical tax on the door-to-door air cargo company that hired the trucker to perform pick up and delivery -- suggesting a tax on the air cargo company would be preempted. *Id.* at *9.

It is apparent that Hawaii's Department of Taxation remains hostile to this Court's interpretation, in *Aloha Airlines*, of federal preemption of taxes on gross receipts from sales of air transportation. Indeed, in its opposition, Hawaii reasserts arguments previously rejected by that decision. Hawaii again argues that the preemption provision should be read in terms of "Congress' desire to avoid the *double* taxation that would result if states as well as the Federal government taxed air transportation," Op. Cert. 14, reasserting the rationale that was rejected in *Aloha Airlines*, 464 U.S. at 12-13. In addition, Hawaii's continuing reliance on the progeny of *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), and other preemption cases deciding very different questions, Op. Cert. 16, disregards this Court's interpretation of the preemption provision as "a federal statute [that] unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce." 464 U.S. at 12.

As this Court has recognized, interstate transportation companies are "easy prey for State and local tax assessors in that they are nonvoting, often nonresident, targets for local taxation, who cannot easily remove themselves from the locality." *Department of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 336 (1994) (quotation omitted). Hawaii's failure to repeal or amend the tax provision this Court held preempted 16 years ago in *Aloha Airlines*, its failure even to adopt regulations recognizing the decision and consistent with it, and its fifteen-year mission to carve significant exceptions out of that decision,

demonstrate the urgent need for clarification from this Court.[4] Moreover, declining to review the decision below would be interpreted by states and localities throughout the country as indicating that *Aloha Airlines* and the preemption provision are far narrower than they had thought, and that imposing taxes on significant portions of the receipts from air cargo sales, and even passenger sales, might well pass muster.

II. THE STATUTORY DEFINITION QUESTION

Hawaii's opposition provides no basis to conclude that its interpretation of the statutory definition of "interstate air transportation" is, as it asserts, the only conceivable reading or that the question has been resolved in the lower courts. Hawaii's plain meaning argument fails to appreciate that statutes commonly set forth general statements and then modify them by subsequent clauses. Thus, reading the opening phrase of the definition ("interstate air transportation" means "the transportation of pasengers or property by aircraft as a common carrier for compensation") as modified by the last clause ("when any part of the transportation is by aircraft") is a natural reading of the text. 49 U.S.C. § 40102(25). As Hawaii acknowledges, some courts have focused on the definition's use of the phrase "by aircraft" in these definitions. Op. Cert. 19-20. Other courts, however, including two courts of appeals, have read the provision as a whole to conclude that transportation meets the statutory definition of *air* transportation if *some* part of the transportation is by aircraft. The continuing confusion among the lower courts as to the proper interpretation of this and

---

[4]Hawaii's indignant claim that it did not choose to view *Aloha Airlines* as limited to passenger transportation is belied by its own history of trying to impose its tax on the *total* gross receipts of air cargo companies *after Aloha Airlines* was decided. *See, e.g., Air Polynesia, Inc. v. Freitas*, 742 F.2d 546 (9th Cir. 1984); *Air Polynesia, Inc. v. Director of Taxation*, Docket No. 2250 (Haw. Tax Appeal Court May 24, 1985).

parallel definitional provisions is incompatible with the uniform national air transportation scheme Congress enacted, and argues strongly for this Court's review of the decision below.[5]

Hawaii's dismissal of the decisions disagreeing with its position as inapposite is unmerited. Particularly hard to understand is its dismissal of *City of Philadelphia v. Civil Aeronautics Bd.*, 289 F.2d 770 (D.C. Cir. 1961). Hawaii concedes that the D.C. Circuit interpreted the "interstate air transportation" definition to conclude that, for cargo shipped from California to Philadelphia, the *entire* trip was interstate *air* transportation, even though the final leg of the trip -- Newark to Philadelphia -- was by truck. Op. Cert. 16. This is the precise opposite of the interpretation adopted below. Under the D.C. Circuit's reading, what Hawaii calls Lynden's "complete delivery service," *id.* at 9, is interstate *air* transportation, even though small distances at the beginning and end are by truck. Since the entire service is interstate air transportation, all receipts from sales of the service are necessarily receipts from air transportation, and Hawaii's tax is preempted. Thus, the D.C. Circuit's interpretation of "interstate air transportation" would make it unnecessary to even reach the question whether the preemption provision permits receipts from sales of air cargo services to be *apportioned* for tax purposes.

The 10th Circuit has reached the same conclusion as the

---

[5]The definitions of "interstate air commerce," "foreign air transportation" and "foreign air commerce" are parallel. The "interstate air commerce" definition uses identical language, § 40102(24); the modifying clauses in the "foreign air commerce" and "foreign air transportation" definitions are parallel: "when any part of the transportation or operation is by aircraft." § 40102(22), (23). Earlier versions of these definitions included equivalent language: "whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation." 49 U.S.C. § 1301(20), (21) (1974); 49 U.S.C. § 1301 (23), (24) (1988).

D.C. Circuit. *See Hill v. National Transp. Safety Bd.*, 886 F.2d 1275 (10th Cir. 1989). Hawaii's basis for asking this Court to disregard that interpretation by a unanimous panel of a United States Court of Appeals, set forth to explain its decision, is that it was discussed in a footnote. Op. Cert. 17. Hawaii's attempt to distinguish a third decision reaching the same conclusion is equally specious. In *United States v. Petrykievicz*, 809 F. Supp. 794 (W.D. Wash. 1992), the court reached the same conclusion as the two Courts of Appeals. Hawaii's dismissal of the case on the ground that it dealt "with the different definition of 'foreign air commerce,'" Op. Cert. 18 n.14, ignores the fact that "interstate air commerce" and "foreign air commerce" are given the same definition in the same subsection, *see* 49 U.S.C. § 1301(23) (1988), and identical language is used to define "interstate air transportation." § 1301(24).[6]

Similarly, Hawaii's *reductio ad absurdum* statutory interpretation argument does not withstand scrutiny. Its main argument for reading the statutory definition to include only those segments of a shipment that are provided by aircraft, rather than all shipments that travel at least partly by aircraft, is that Congress could not have intended to include shipments in which "the air segment was only a minor part of the overall voyage." Op. Cert. 8. Had Congress been faced with such possibilities, it might have chosen to draft its statute more narrowly. Congress, however, was not. For example, Lynden has calculated the cost and time for the example Hawaii relies on, both by the hypothetical route Hawaii posits from Denver to Maui, *id.*, and by air, for a typical freight shipment of 100 lbs. Shipment by the method posited by Hawaii would require approximately 16 days and cost at least $193. Shipment by air,

---

[6]Hawaii's dismissal of the express text of 14 C.F.R. § 222.2 as "not carefully worded" and its substitution of a preferred interpretation, Op. Cert. 11 n.8, is premised neither on cited authority nor known interpretative tools.

with truck pick up and delivery at either end, would require 3 days and cost $80. Since Congress could reasonably rely on market pricing and timing to motivate shippers to choose less costly, less time-consuming routes, its failure to draft the statute to exclude such unrealistic hypotheticals can legitimately be read only to indicate that Congress knew its general language would suffice because there was no danger of economically irrational transportation choices circumventing its intent.

This Court's guidance as to the proper interpretation of these statutory definitions would have a substantial impact, because these provisions delineate agency powers and governing rules with respect to many aspects of interstate and foreign air transportation. The decision below presents both the preemption and the definitional questions squarely and cleanly.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GREGG D. BARTON
PERKINS COIE LLP
1201 Third Avenue
48th Floor
Seattle, WA 98101-3099
(206) 264-6358

BRUCE J. ENNIS, JR.*
NORY MILLER
JENNER & BLOCK
Twelfth Floor
601 Thirteenth Street, N.W.
Washington, D.C. 20005-3807
(202) 639-6000

April 9, 1999

**Counsel of Record*